

## **Exhibit 7**

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IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF TEXAS  
MARSHALL DIVISION

MICROBES, INC. and )  
RHIZOGEN, L.L.C., )  
 )  
Plaintiffs, )  
 )  
vs. ) CIVIL ACTION FILE  
 ) NO.: 2:09-CV-00237  
 )  
THE ESPOMA COMPANY, ADVANCED )  
MICROBIAL SOLUTIONS, L.L.C., and )  
CALLOWAY'S NURSERY, INC., )  
 )  
Defendants. )

- - -

VIDEOTAPED DEPOSITION OF  
JOSEPH KLOEPPER  
JANUARY 19, 2011  
9:00 A.M.

HILL, KERTSCHER & WHARTON, LLP  
3350 RIVERWOOD PARKWAY SUITE 800  
ATLANTA, GEORGIA

REPORTED BY:  
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CCR-B-1372

1 together is for us to have a discussion about  
2 these terms. I think we should start with the  
3 definition of the term yield.

4 Your testimony to the Court will be that  
5 the term yield means increasing the amount of  
6 food crop harvested per unit area of land, is  
7 that right?

8 A. Yes.

9 Q. And your testimony will be that the  
10 yield is not measured on an individual plant,  
11 is that right?

12 A. I would say it's not commonly measured  
13 on an individual plant, and the reason I'm  
14 saying that is I'm sure we'll find papers  
15 where somebody says yield was determined, say,  
16 in a greenhouse on something like a tomato and  
17 it might have been done on so many plants. So  
18 in the broadest sense, people use the term  
19 yield in a more specific way. But I would  
20 agree that the most common way of measuring  
21 and determining yield, especially in fields,  
22 it's not on an individual plant.

23 Q. Okay. So it's the amount of food crop  
24 harvested per unit area of land and not  
25 measured on an individual plant; that's your

1 A. What's the question, I'm sorry?

2 Q. The question is, in a general sense,  
3 as you exemplified it with yogurt, a probiotic  
4 bacteria benefits the organism to which it is  
5 applied, in this case a human being in the  
6 case of yogurt, right?

7 A. Yes.

8 Q. In the case of plants or fertilizers  
9 where the bacillus -- the probiotic bacillus  
10 bacteria is applied to the rhizosphere, the  
11 root zone of the plant, does the probiotic  
12 bacteria have a beneficial effect on the plant  
13 in the same way that the bacteria in yogurt  
14 would benefit the human being?

15 A. It does have a benefit on the plant.

16 Q. And would the benefit be exemplified  
17 by increasing yield?

18 A. That would be one of the ways it would  
19 be exemplified.

20 Q. And another example would be reducing  
21 the nitrogen requirements of the plant, right?

22 A. Yes.

23 Q. And would another benefit be something  
24 that we discussed earlier, protecting the  
25 plant from something bad happening to it?

1           A.     It could, however -- see, this gets  
2     into the -- these terms.     Some terms have a  
3     scientific technical meaning, others are more  
4     used in kind of general discussions in  
5     society.

6           Q.     Right.

7           A.     Probiotic is in that second category.  
8     The term -- and I'm getting to your question  
9     because your question would it also include --  
10    would probiotic also include these disease  
11    protecting?     We have another word that's more  
12    commonly used for that, which is biocontrol --  
13    biological control.     I've -- so that's why to  
14    me this proposed terminology here that talks  
15    about yield and nitrogen is sufficient.

16          Q.     Okay.     But it could have other  
17    benefits on the plant besides nitrogen and --

18          A.     There could be other benefits.

19          Q.     Okay.     Well, let's look at it -- at  
20    the phrase probiotic bacillus bacteria as it  
21    appears in claim term number 15.

22          A.     15.

23          Q.     That's on the next page -- actually,  
24    the next two pages.     Term 15 says probiotic  
25    bacillus bacteria capable of enhancing

1 Q. That's the exhibit we've been  
2 discussing.

3 A. Oh, it's the same one. Okay. Which  
4 page again?

5 Q. Page 25. The term is humic acid, and  
6 that's term number 12.

7 A. Yes.

8 Q. And my question is what is the  
9 definition of humus?

10 A. Humus is decayed organic material, and  
11 typically often in the general term of like  
12 soil science the humus is the upper layer of  
13 the soil that has this decaying plant  
14 material.

15 Q. So it's any -- is it any plant  
16 material decays and forms humus?

17 A. Well, lignin is one of the main  
18 compounds plant cell walls break down, and  
19 humic substances can include humus, humic acid  
20 and another acid, folic acid.

21 Q. So is humus, humic acid, are those  
22 different things?

23 A. They are different by some ways of  
24 clustering these. I have read where people  
25 clump humus together in the general category

1 of humic substances and include humic acid as  
2 another of the humic substances. But in the  
3 general usage and the way that like soils by  
4 science 101 is taught usually is humus is the  
5 actual more recently decaying organic  
6 material. That's the stuff that gardeners  
7 want to put in their garden to have nice lumpy  
8 soil. Humic acid is more of a specific  
9 compound.

10 Q. Okay. Well, let me refer to the  
11 definition of humic acid as proposed by  
12 defendants in Exhibit 119. It states that  
13 humic acid is an acid that is naturally  
14 produced during the decomposition of organic  
15 matter. Do you see that?

16 A. Yes, I do.

17 Q. Now, is humic acid a product of  
18 decomposition after an extended period of time  
19 or is it something that would fit under the  
20 definition of humus that you just described?

21 A. Humic acid can come from humus, but it  
22 can also come from organic materials that have  
23 been for a long period of time, such as even  
24 lignite and coal.

25 Q. Okay. So humus can turn into humic

1       it be true that in the context of how humic  
2       acid is used in this patent, it's used as a  
3       hardening agent?

4           A.     It was my understanding that it's used  
5       for that and also as a -- just a source of  
6       organic material.

7           Q.     Okay. Looking to line 64 and 65,  
8       there's a statement, quote, "Potassium humate  
9       derived from oxidized lignite is also  
10      effective." Do you see that?

11          A.     Yes, I do.

12          Q.     Now, based on how the humates are  
13      described, including potassium humate in the  
14      patent, would you include humates as a humic  
15      acid?

16          A.     Well, the humate would be the salt  
17      form, so it's technically not an acid, but I  
18      would include them in humic substances is the  
19      way -- the categories I've usually seen. So  
20      it's obviously very much related to humic  
21      acid, but it's not in acid form.

22          Q.     But in your experience, do they  
23      typically exist together?

24          A.     You often have both humates and humic  
25      acid together.